

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LEONHARDT L. RAUSCHER AND	:	
KATHRYN H. RAUSCHER	:	DETERMINATION
	:	DTA NO. 810567
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1987 and 1988.	:	

Petitioners, Leonhardt L. Rauscher and Kathryn H. Rauscher, 1240 Pepperidge Terrace, Boca Raton, Florida 33486, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1987 and 1988.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 10, 1992 at 9:15 A.M., with all briefs submitted by March 19, 1993. Petitioner Leonhardt L. Rauscher appeared pro se and for Kathryn H. Rauscher. The Division of Taxation appeared by William F. Collins, Esq. (Craig Gallagher, Esq., of counsel).

ISSUE

Whether petitioners have shown that they were domiciled in Florida and were therefore nonresidents of New York during the years in issue.

FINDINGS OF FACT

Following an audit which determined that petitioners were residents of the State of New York for the years 1987 and 1988, the Division of Taxation ("Division") issued to Leonhardt L. Rauscher and Kathryn H. Rauscher a Notice of Deficiency, dated June 7, 1991, setting forth the following information:

<u>Tax Period Ended</u>	<u>Tax Amount Assessed</u>	<u>Interest</u>	<u>Penalty</u>	<u>Balance</u>
12/31/87	\$ 4,584.45	\$1,409.78	\$2,562.39	\$ 8,556.62
12/31/88	<u>7,472.68</u>	<u>1,604.37</u>	<u>1,923.08</u>	<u>11,000.13</u>
Totals	\$12,057.13	\$3,014.15	\$4,485.47	\$19,556.75

After a conciliation conference held in the Bureau of Conciliation and Mediation Services on November 26, 1991, a Conciliation Order was issued which reduced the total amount of tax in issue and cancelled all penalty with regard to both years in issue. For the year 1987 tax remained the same, while for the year 1988 the total tax due was reduced to \$1,754.20.

According to the notes taken by Ms. Kathy Engelhardt, the auditor assigned to this case, the modification made by the conciliation conferee reflected the finding that petitioners were domiciliaries of the State of New York through March 31, 1988 due to petitioners' demonstration that it was their intention to abandon their New York domicile as of April 1, 1988.

Petitioners continued to protest that portion of the audit period sustained by the conciliation conferee, i.e., the entire year 1987 and the first quarter of the year 1988.

During the years in issue, petitioners filed New York State nonresident income tax returns on Forms IT-203 setting forth their address as 23277 Water Circle, Boca Raton, Florida 33486. On the return for 1987, petitioners claimed their occupations as "self-employed" for husband and "housewife" for wife. Mr. Rauscher filed a schedule C with said 1987 return indicating that he was proprietor of a real estate sales business known as "L. R. Real Estate" of Wainscott, New York.

Additionally, petitioners filed a schedule E with their nonresident income tax return for 1987 which indicated rental and/or royalty income from two business entities, Hampton Mower and Southfork Honda. A second schedule E was filed with the 1987 return indicating rental income from properties located at 38-40, 42 and 44 Gingerbread Lane, Easthampton, New York.

The New York State nonresident income tax return for the year 1988 indicated the same rental income on attached schedule E's.

Additionally, both the 1987 and 1988 returns reported installment sale income from the sale of various properties owned by petitioners both within and without New York State.

For the year 1987, petitioners reported income from 11 installment sales, 9 of which were within New York State. On the 1988 return, petitioners reported income from 9 installment sales, 7 of which were sales of property within New York State.

Additionally, both returns listed schedule E rental properties in which petitioners indicated they maintained active participation in the rental operations.

Petitioner Leonhardt Rauscher executed a revocable trust agreement on May 2, 1990 which mentioned two additional properties, one located on Montauk Highway a/k/a Hands Creek Antiques and property located at Daniels Holes Road in Easthampton, New York. The revocable trust agreement was executed by Mr. Rauscher in Palm Beach County, Florida.

During 1987 and 1988, petitioners spent approximately 150 days in the State of New York between late May and October.

Petitioners have lived most of their lives in the Easthampton/Wainscott area. Although they purchased a house in Florida in 1974, they did not declare their domicile in Florida until 1982, when Mr. Rauscher allegedly ended his business affiliations in the Easthampton/Wainscott area.

From the mid-1970's Mr. Rauscher began to involve himself in the real estate business, which was a departure from his prior involvement in more hands-on businesses such as a motor vehicle business, a power equipment business, service stations and marinas.

Mr. Rauscher explained that the L. R. Real Estate business listed on his schedule C attached to his 1987 New York State income tax return was, in fact, an inactive business and the office he maintained for said business was leased to a third party which operated a separate business from the same location. However, no explanation of the gross receipts received by L. R. Real Estate or its expenses, as shown on the schedule C, was offered.

Mr. Rauscher also retained office space at his residence on Main Street in Wainscott, New York, which now serves as the home of one of his sons. Mr. Rauscher also maintained a telephone listing during the years in issue, as set forth in the 1990 Suffolk County telephone directory, (516) 537-7544. During the years in issue, Mr. Rauscher employed during the audit period, and in fact since 1986, a man by the name of William Messner, who performed bookkeeping duties for approximately 2½ days per week, performing such tasks as collecting rents on Mr. Rauscher's rental properties.

During the years in issue, Mr. Rauscher maintained a Post Office box address in Wainscott, New York. The Post Office in Wainscott, New York informed the auditor that mail was received at Mr. Rauscher's Post Office box in Wainscott, New York and was collected regularly by his secretary, Mr. William Messner. The Post Office informed the auditor that the mail was not forwarded and that the Post Office box appears to have been used for individual use. The Post Office informed the auditor that originally mail was received on behalf of Hampton Mower Service and Southfork Honda; however, those businesses subsequently acquired have their own Post Office boxes.

A Department of Motor Vehicles search indicated that Mr. Rauscher maintained a New York State driver's license until it was surrendered to the State of Florida on May 1, 1987. Mrs. Rauscher maintained a New York State driver's license until she surrendered it to the State of Florida on December 1, 1988.

Additionally, Mr. Rauscher maintained a registration for his 1986 four-door Cadillac sedan which was purchased and registered in New York at least through January 10, 1990. The registration listed the owner as Leonhardt L. Rauscher of Main Street, Box 190, Wainscott, New York. Also registered to Mr. Rauscher at the same address was a 1984 Sears light trailer which had a registration expiration date of December 31, 1991. Petitioner testified that this registration was still in effect as of the date of hearing.

Petitioners filed a certificate of Florida domicile on January 15, 1982 and produced voter registration cards to the auditor dated February 24, 1986. Petitioners

produced a diary kept by Mrs. Rauscher which had been created sometime on or after November 8, 1988. The entry for November 8, 1988 stated, in pertinent part, as follows:

"Leon and I left Wainscott at 5:00 A.M. Tuesday, October 30, 1988. We drove to Hendersonville, N.C. where we have purchased a home. We expect to live this summer and winter in our beautiful home in Boca Raton. I feel very sad about leaving my birthplace and all my family; however, I am sure I will return as a visitor from time to time and also my family will visit me in N.C. and Florida. I love Florida but N.C. is very new territory for me. Time will tell."

Petitioners acquired a home in Wainscott, New York in 1961 which they still owned as of July 23, 1990, when it was disclosed on the residency questionnaire filed by Mr. Rauscher with the Division. In the questionnaire Mr. Rauscher stated that he and his wife "still own it [the house in Wainscott, New York] but am in the process of transferring it to a son who lives in it." Mr. Rauscher also stated that while staying in New York, he stayed at the house he and his wife owned jointly.

Also on the questionnaire Mr. Rauscher stated, in answer to "what is your business, trade, profession or occupation", that he was "semi-retired" or "retired". He gave his principal business address as Box 190, Wainscott, New York and stated that he had a secretary, Mr. William Messner, and a telephone number at which Mr. Messner could be contacted, which was the same telephone number listed in the Suffolk County telephone book under Leon L. Rauscher of Main Street, Wainscott, New York.

Petitioners maintained bank accounts at the Bridgehampton National Bank in Wainscott, New York during the years in issue.

Of all the properties listed, the property referred to as the Halsey House in Wainscott, New York was owned 50% by Mr. Rauscher and 50% by his son. The property referred to as Hands Creek Antiques was a rental property and petitioners had no connection with the business run therein.

Besides Mr. Messner, who performed bookkeeping duties for Mr. Rauscher, Mr. Rauscher also utilized the services of an attorney in Wainscott as a "trustee" for his properties. His duties were not specified and it was never alleged that petitioners' real property in New York was held in trust.

On April 10, 1987, Mr. Rauscher resigned from the Lion's Club of Easthampton, New York. In a letter of the same date, Mr. Rauscher stated:

"Frankly, since I am now spending by far the majority of the year out of Easthampton, I am of little use to the club and you are probably spending more on me than I am contributing to it."

His April 1987 resignation was acknowledged by John Dana Smith, secretary of the Lion's Club of Easthampton, in a letter dated November 20, 1991.

Although petitioners assert that they changed their domicile in 1982, in 1985 Mr. Rauscher ran for elected office, Town Supervisor of Easthampton, New York. Further, in 1986, petitioners filed a 1985 resident tax return for the State of New York.

CONCLUSIONS OF LAW

A. Tax Law § 605(b) provides, in pertinent part, as follows:

"(1) Resident individual. A resident individual means an individual:

"(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .

* * *

"(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

B. While there is no definition of "domicile" in the Tax Law (compare, SCPA 103[15]), the Division's regulations (20 NYCRR former 102.2[d]) provide, in pertinent part:

"(d) Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent. (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

* * *

"(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

Permanent place of abode is defined in the regulations at 20 NYCRR former 102.2(e)(1)

as:

"a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

C. To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 App Div 444, 445, 126 NYS 970). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276). The concept of intent was addressed by the Court of Appeals in Matter of Newcomb (192 NY 238, 250-251):

"Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

"The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence although continued for a long time, does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile There must be a present, definite, and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim, or fancy, for business, health, or pleasure, to secure a change of climate, or change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and the acts of the

person affected confirm the intention No pretense or deception can be practiced, for the intention must be honest, the action genuine, and the evidence to establish both clear and convincing. The animus manendi must be actual with no animo revertendi. . . .

"This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice."

D. The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138, 140). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990). The Court of Appeals articulated the importance of establishing intent, when, in Matter of Newcomb (supra) it stated, "No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both clear and convincing." While petitioners made certain formal declarations that they changed their domicile (e.g., Florida Declaration of Domicile and voter registration), such declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life" (see, Matter of Silverman, Tax Appeals Tribunal, June 8, 1989, citing Matter of Trowbridge, 266 NY 283, 289). A taxpayer may change his or her domicile without severing all ties with New York State (see, e.g., Matter of Sutton, Tax Appeals Tribunal, October 11, 1990). The question is whether petitioners' overall conduct contradicted their formal declarations of a change of domicile to Florida.

E. Upon review of the record in this matter, it is determined that petitioners did not abandon their New York domicile until 1988. Petitioners' conduct, both formal and informal, is consistent with this conclusion.

The Rauschers apparently intended to move to Florida sometime after they purchased their house there in 1974. However, they used this house as a winter retreat and dabbled in real property in North Carolina as well. The Rauschers never made and acted on the ultimate

decision to change domicile until November 1988, when Mrs. Rauscher, in her diary, clearly stated her belief that they were leaving their home in New York State permanently with no intent to return to it as their permanent residence or the place to which they intended to return whenever they may be absent (20 NYCRR former 102.2[d]).

Other critical factors were Mr. Rauscher's inability to clearly explain his involvement in the real estate business he maintained during 1987 as set forth on the schedule C attached to the 1987 nonresident tax return or the fact that mail was received year round at petitioner's Post Office box in Wainscott, New York. He also maintained a telephone line, employed a personal bookkeeper for 2½ days per week, utilized a local attorney to act as his "trustee" for his real property in the Wainscott/Easthampton area and undeniably earned a good deal of money from his investments in commercial and residential real property maintained in that area. Petitioners retained New York State driver's licenses, New York State automobile and trailer registrations and New York State bank accounts.

Petitioners claim to have changed their domicile in 1982, and point to the fact that they filed declarations of domicile in Florida, registered to vote in Florida and received a homestead exemption there. However, in 1986 petitioners filed a New York State resident income tax return for 1985 and Mr. Rauscher ran for supervisor in the Town of Easthampton.

Petitioners exhibited the classic characteristics of "snowbirds", individuals who winter in the warm, southern climates and summer in the cooler and less humid State of New York. They spent approximately 150 days per year in New York, not an insignificant amount of time, and not a factor to be lost or discounted in a domicile case involving two individuals who spent the great majority of their lives in the Wainscott/Easthampton, New York area and had substantial and varied business interests in the same area. Not one of these factors by itself would be dispositive of the domicile issue, but taken together they make a strong case for finding significant ties to New York which demand a very clear and strong offer of proof that petitioners intended to abandon their New York domicile. Petitioners have not demonstrated this in the present case. Their intent to abandon was not manifest until the diary entry by

Mrs. Rauscher on November 8, 1988.

Further, as stated in the Tribunal's Silverman case, the "general habits of life" are more persuasive than those formal declarations of domicile and voter registrations. Petitioners have failed to introduce any of those "habits" into the record. There is no evidence of social ties outside of New York, patterns of life in their alleged new home or other nuances which can lead to the conclusion that they have established a new domicile.

Petitioners argue that because they voted in Florida, would not have been Medicaid eligible in New York and could not avail themselves of the exclusion of gain on the sale of their Wainscott home they should be considered Florida domiciliaries. But these factors are controlled by residence, not domicile. Further, petitioners' characterization of the elements of domicile as "trivial" is clearly due to a misunderstanding of the term as defined in the regulations and the case law cited above.

F. The petition of Leonhardt L. Rauscher and Kathryn H. Rauscher is denied and the Notice of Deficiency dated May 28, 1991, as modified by the Conciliation Order dated February 7, 1992, is sustained.

DATED: Troy, New York
August 19, 1993

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE